Supreme Court, U.S.
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No. 09-712

In The Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST, P.C., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITIONS TO INGRID FELDERHOF'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fifth Circuit's Rule 60(b)(1) "excusable neglect" analysis conflict with *Pioneer Investment Services Company, v. Brunswick Associates Limited*, 507 U.S. 380, 113 S.Ct. 1489 (1993), which requires a district court to consider multiple and specific factors?

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ARGUMENT

The Fifth Circuit's Rule 60(b)(1) excusable neglect standard violates the standard set forth in *Pioneer Investment Services Company v. Brunswick Associates Limited*, 507 U.S. 380, 113 S. Ct. 1489 (1993), which requires a balance of multiple, equitable factors. Relying on pre-*Pioneer* case law, the Fifth Circuit deems the *Pioneer* factors inapplicable, causing a conflict with other circuits. Moreover, the circuits that have accepted the *Pioneer* factors to measure excusable neglect have applied the factors inconsistently. This Court should accept certiorari to create uniformity among the circuits with respect to the application of the *Pioneer* factors under Rule 60(b)(1).

In response to Ms. Felderhof's Petition for Writ of Certiorari, Groia & Co. and Jenkens & Gilchrist, P.C. argue principally that (1) the Fifth Circuit's *Dierschke* test is tantamount to the balancing test set forth in *Pioneer*, (2) the circuits are uniform in their application of *Pioneer*, and (3) Ms. Felderhof is a willful, vexatious litigant who does not deserve the Court's attention. Petitioner responds to these arguments in turn as follows.

A. The Fifth Circuit's *Dierschke* standard does not satisfy *Pioneer*'s elements.

Under *Dierschke*, the Fifth Circuit allows a district court to deny Rule 60(b)(1) relief if there is a

finding of willfulness without consideration of any other factor. This is directly contrary to *Pioneer*'s requirement that *all* equitable factors must be considered. *See* Petition at 8-14. Despite the clear conflict, Jenkens and Groia argue the Fifth Circuit's stop-at-willfulness approach is consistent with *Pioneer*.

Specifically, Respondents argue that a finding of willfulness is actually an independent inquiry that must be satisfied before the *Pioneer* factors come into play. *See* Groia Brief in Opp. at 12-15; Jenkens Brief in Opp. at 14. Their position, however, demands a tortured reading of the Court's decision in *Pioneer*. As stated in *Pioneer*, the Rule 60(b)(1) factors include whether the movant acted in good faith or bad faith. *See Pioneer*, 507 U.S. at 394 (identifying "good faith" as one of many relevant circumstances surrounding a party's omission). Respondents do not explain how "willfulness" differs from *Pioneer*'s inquiry into such facts.

Moreover, the circuits that have adopted *Pioneer* analyze willfulness as an element of the good faith factor in the larger balancing equation. *See, e.g.*, *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1225 (9th Cir. 2000) ("there is no evidence that he acted with anything less than good faith. His errors resulted from negligence and carelessness, not from deviousness or willfulness."); *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 496 F.3d 863, 867 (8th Cir. 2007) ("In determining whether a party has acted in good faith we have consistently sought to distinguish between contumacious

or intentional delay or disregard for deadlines and procedural rules, and a 'marginal failure' to meet pleading or other deadlines."); *Raymond v. Ameritech Corp.*, 442 F.3d 600, 607 (7th Cir. 2006). The notion that "willfulness" is a threshold inquiry that must be satisfied before *Pioneer*'s equitable factors apply lacks support.

Dierschke, which predates *Pioneer*, is the genesis of the Fifth Circuit's stop-at-willfulness analysis. 975 F.2d 181, 183 (5th Cir. 1992). *Dierschke* does not cite *any* authority for the proposition that the willfulness alone is sufficient to deny relief under Rule 60(b)(1). *Id.* In *Dierschke*, the Fifth Circuit made willfulness talismanic and departed from other circuits which balance all of the equitable factors. *Id.* at 183-84 (acknowledging a variance among circuits, but choosing to apply the willfulness factor in the disjunctive without consideration of the remaining factors). With its recent decisions in *Jenkens*, 542 F.3d at 119-20 and *In re OCA, Inc.*, 551 F.3d at 370, the Fifth Circuit reinforced *Dierschke*'s departure from the majority application.

As discussed in the Petition, *Pioneer* requires a balancing of several equitable factors to be considered in determining excusable neglect, including good faith. The analysis of a litigant's intent behind the failure to timely answer, whether characterized as willfulness or bad faith, is subsumed within the good faith inquiry. The Fifth Circuit's isolation of this factor as a separate, dispositive inquiry is inconsistent with *Pioneer* and the circuits which have adopted it. Petitioner requests this Court accept certiorari and

hold that the Fifth Circuit's *Dierschke* analysis violates the excusable neglect analysis set forth in *Pioneer*.

B. The Circuits are not uniform in their application of *Pioneer*; they employ different analyses, which yield inconsistent results.

Respondents also argue that Ms. Felderhof's petition does not warrant Supreme Court review because there is no confusion among the circuits as to the proper application of the *Pioneer* factors. *See* Groia Brief in Opp. at 16-18; Jenkens Brief in Opp. at 18. Recent circuit caselaw shows otherwise. The Ninth Circuit, sitting *en banc*, recognized:

> Our circuit's confusion is not isolated. The authorities interpreting *Pioneer* in a number of circuits are in some disarray. In fact, the confusion begins with *Pioneer* itself, and various subsequent circuit opinions have cited similar portions of *Pioneer* to support their respective but differing conclusions.

Pincay v. Andrews, 389 F.3d 853, 856-57 (9th Cir. 2004) (*en banc*).

Respondents argue that although the circuit courts sometimes refer to the *Pioneer* factors by different names, they apply the *Pioneer* factors uniformly. Such is not the case, however. For example, compare the following conflicting pronouncements of the *Pioneer* standards:

> "The four *Pioneer* factors do not carry equal weight; *the excuse given for the late filing must have the greatest import.*"

Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 463 (8th Cir. 2000) (emphasis added). *Accord Hospital del Maestro v. N.L.R.B.*, 263 F.3d 173, 175 (1st Cir. 2001).

> "We will ordinarily examine *all of the circumstances involved* rather than holding that any single circumstance in isolation compels a particular result regardless of the other factors."

Briones v. Riviera Hotel & Casino, 116 F.3d 379, 382 n.2 (9th Cir. 1997) (emphasis added).

> "In *Pioneer,* the Supreme Court accorded primary importance to the *absence of prejudice* to the nonmoving party and to the *interest of efficient judicial administration* in determining whether the district court had abused its discretion."[1]

Cheney v. Anchor Glass Container Corp., 71 F.3d 848, 850 (11th Cir. 1996) (emphasis added).

> "If the reason for the delay were the only factor to consider, or even the most important

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[1] Under this variation of *Pioneer*, it must be emphasized that in *Jenkens I*, the Fifth Circuit held that Jenkens would not be prejudiced by setting aside the default, that Felderhof had meritorious defenses, and that other facts, such as the amount in dispute, will weigh in her favor. App 21-27.

> one, we might agree that the neglect in this case could not be excused. But *Pioneer* makes clear that the standard is a balancing test, meaning that a delay might be excused even where the reasons for the delay are not particularly compelling."

U.S. v. Brown, 133 F.3d 993, 997 (7th Cir. 1998).

As these excerpts reveal, the lower circuits apply the *Pioneer* factors inconsistently, assigning different weights to different factors, sometimes to the exclusion of the remaining factors.[2] Further, some circuits,

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[2] Notably, the conflicting applications of the "excusable neglect" standard have not only created conflicts among the circuits, but conflicts within circuits *See, e g , Pincay*, 389 F.3d at 856-57 (identifying a series of conflicting decisions within the Ninth Circuit) Consider the following, contradictory excusable neglect analyses conducted by different panels within the Eighth Circuit·

> "Whether the movant had a good reason for delay is a key factor in the analysis, *Lowry v McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir.2000), but *even without a satisfactory explanation*, relief may be required where other equitable considerations weigh strongly in favor of setting aside the default judgment "

Feeney v AT & E, Inc., 472 F 3d 560, 563 (8th Cir 2006) (citation omitted) (emphasis added).

> "Notwithstanding the relatively flexible *Pioneer* standard, '*there still must be a satisfactory explanation* for the late filing.' *Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001) . . As this court has previously stated, 'at the end of the day, the focus

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namely the Fifth Circuit, do not apply *Pioneer* at all. Compare the various recitations of the balancing test discussed above with the following willfulness test employed by the Fifth Circuit:

> "The district court need not consider all of the above factors in ruling on a defendant's 60(b)(1) motion; 'the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause.' . . . if a district court finds a defendant's default to be willful, 'the district court need not make any other finding.'"

Jenkens & Gilchrist v. Groia & Company, 542 F.3d 114, 119-20 (5th Cir. 2008) (citing *In re Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992)).

In sum, different circuits, and even different panels within the same circuit, apply the *Pioneer* factors differently, or, in the case of the Fifth Circuit, not at all. Some cases within some circuits apply a balancing test where no one factor is dispositive. *See Lemoge v. U.S.*, 587 F.3d 1188, 1192 (9th Cir. 2009) (the district court's failure to consider and balance all *Pioneer* factors was an abuse of discretion); *U.S. v. Brown*, 133 F.3d 993, 997 (7th Cir. 1998); *Nafziger v. McDermott Intern., Inc.*, 467 F.3d 514, 522 (6th Cir. 2006).

> must be upon the nature of the neglect.' *Lowry*, 211 F.3d at 463."

Gibbons v. U.S, 317 F.3d 852, 855 (8th Cir. 2003) (emphasis added).

Other cases give primacy to the good faith element, but nonetheless conduct a balancing of all factors. *See Lowry,* 211 F.3d at 463; *Jennings v. Rivers*, 394 F.3d 850, 856-57 (10th Cir. 2005) (remanding in light of the district court's failure to consider the *Pioneer* factors). Interestingly, although the Eleventh Circuit also balances the *Pioneer* factors, the Eleventh Circuit treats the absence of prejudice as the most important factor. *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996). *Accord Walter v. Blue Cross & Blue Shield United of Wisconsin*, 181 F.3d 1198, 1201 (11th Cir. 1999). The Fifth Circuit, however, has never adopted the *Pioneer* balancing requirement, and, instead, relies on pre-*Pioneer* case-law, which, to the exclusion of other factors, focuses on the narrow issue of good faith. *See Jenkens*, 542 F.3d at 119-20. *See also In re OCA, Inc.*, 551 F.3d 359, 370 (5th Cir. 2008) (citing only the pre-*Pioneer* case, *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 64 (5th Cir. 1992), for the proposition that a finding of willfulness excuses the balancing analysis).

Petitioner asks the Court to clarify the proper application of the *Pioneer* factors and establish uniformity among the Circuits.

C. Respondents mischaracterized the record below.

Seemingly in an effort to draw the Court away from the divergence in the application of the excusable neglect standard throughout the country,

Respondents dedicate significant portions of their oppositions to addressing specific factual disputes between the parties.[3]

Respondents attempt to paint Ms. Felderhof as a contumacious litigant who willfully evaded the present lawsuit and "disrespectfully snubbed the imprimatur of the entire judiciary." Groia Opp. at 15. Their characterizations are not supported by the record (*See* Petition at 14-20) or simple logic. Ms. Felderhof had nothing to lose by participating in this lawsuit and everything to gain, namely, the return of her residence. Far from the typical defaulting party who engages in gamesmanship to avoid a potential liability in a lawsuit, it was in Ms. Felderhof's best interest to litigate the ownership of her house. As the *Jenkens I* court recognized, "it would be quite strange indeed for Ms. Felderhof to willfully default when

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[3] For example, Jenkens erroneously accuses Ms. Felderhof of refusing a FedEx delivery and instructing her former law firm not to accept communications from Jenkens. Jenkens' Resp at 5. The FedEx delivery referenced by Jenkens did not have a street address and likely never reached Ms. Felderhof. The instruction to her former law firm was to destroy abusive faxes from her *husband* It had nothing to do with Jenkens and pre-dated the dispute over the Residence by several months. Likewise, Respondents claim Ms. Felderhof willfully refused service under the Hague. *See* Jenkens Opp at 10. Ironically, at the time Jenkens alleges Ms. Felderhof refused service under the Hague (Jan. 31st), the default had been taken, and she was already fighting to get back into the lawsuit Not surprisingly, no court has found she refused any Hague service. These and other unfounded accusations are easily disproven by the record.

doing so would destroy her interest in the home." App. 29-30. In fact, Ms. Felderhof – not Respondents – *initiated* the discussions that gave rise to the interpleader action in September 2006. App. 12-13. She continued to demand the return of her residence in October and November 2006. App. at 29 ("Ms. Felderhof engaged in regular correspondence with Jenkens concerning the dispute over the Williamsburg residence."). Rather than consciously evading the lawsuit, she immediately brought the legal papers to her local Caymanian attorney, who was out of the country at the time. App. 13-14. Having never seen a summons, Ms. Felderhof and her Caymanian attorney, both of whom are foreign citizens, believed the Order for Conference was an instruction for her to appear in the lawsuit, much like a summons. *See* App. 30. And no one could realistically suggest that Ms. Felderhof has not fought tooth-and-nail for two years for the right to participate in this lawsuit and reclaim ownership of her house.[4]

Interestingly, rather than argue the specific findings of willfulness in the district court's order, Respondents argue evidentiary points that were not included in the district court's order. *See* Jenkens

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[4] Although Jenkens makes much of the forty-four day period between learning of the default and filing petitioner's motion to vacate (Jenkens Opp. at 7, 12), the Fifth Circuit has already considered this argument as well as the controverting evidence and concluded Ms Felderhof acted promptly and diligently in attempting to vacate the judgment. App 26-27.

Brief in Opp. at 19. As pointed out in the Petition, and as tacitly acknowledged by Respondents' failure to defend these findings, the trial court's findings of willfulness are easily disproven by the record. The Fifth Circuit has already considered the same record before the Court and determined, "we do not believe the record conclusively shows that her default was willful." App. at 29.

CONCLUSION

For all of these reasons, Ingrid Felderhof requests this Court to grant her Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals and the District Court. Ms. Felderhof deserves an opportunity to appear in the lawsuit and fight for the return of her residence.

Respectfully submitted,

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